Portneka Sdn Bhd & Anor v Mitisa Holdings Sdn Bhd (in liquidation)

COURT OF APPEAL (MALAYSIA) — APPEAL NO W-02(IM)-891–07 OF 2020
LAU BEE LAN, AZIZAH NAWAWI AND NORDIN HASSAN JJCA
12 JULY 2021

Companies and Corporations — Liquidators — Application for directions — Whether directions sought by liquidator were directions or advice for general administration — Whether directions were a judgment or order — Whether the directions were appealable — Companies Act 2016 s 487(3) — Courts of Judicature Act 1964 s 67(1)

This was the respondent's notice of motion ('encl 9') made pursuant to s 67(1) of the Courts of Judicature Act 1964 ('the CJA') for an order that the notice of appeal filed by the appellants ('NOA') be struck out. The respondent was appointed by Pembinaan BLT Sdn Bhd ('PBLT') as the main contractor in relation to a construction project ('the project'). Subsequently, the respondent awarded certain aspects of the works in the project to other companies, who were the nominated subcontractors ('NSCs'). The appellants were the NSCs to carry out the mechanical and electrical works respectively for the project. Under the main contract, progress payments from PBLT were to be made to the respondent and the respondent in turn would make payments to the appellants. However, throughout the contract, PBLT had made the progress payments directly to the appellants. The respondent was subsequently wound up and the official receiver was appointed. About a month after the respondent was wound up, PBLT terminated the main contract with the respondent. PBLT then sought and obtained the official receiver's consent to pay the appellants directly to ensure that the appellants completed their scope of works. One Baltasar bin Maskor ('Baltasar') was then appointed as the respondent's private liquidator in place of the official receiver. Baltasar issued a letter dated 13 April 2017 directing PBLT to make the NSCs' final claims to be paid directly into the respondent's liquidation account. Despite the appellants' objections, three final payments were withheld by PBLT, resulting in three suits being filed by the appellants against PBLT in the sessions court. Portneka then filed its proof of debt ('POD') with the liquidator. After the filing of the three suits by the appellants against PBLT, the respondent filed an amended notice of motion dated 4 March 2020 in the High Court. The said motion posed the following questions and sought consequential reliefs, inter alia: (i) whether the sum of RM2,385,412.81, due and payable by PBLT to the respondent in relation to the project should include the amounts due and payable to the NSCs; and (ii) if yes, whether all payments paid by PBLT to the respondent up

to the sum of RM2,385,412.81 in relation to the project should be distributed to all unsecured creditors whom their POD were admitted in a *pari passu* manner, including the subcontractors. The High Court answered the question in paras (i) and (ii) in the affirmative. Dissatisfied, the appellants appealed against the decision of the judicial commissioner ('JC'). In supporting their motion to strike out the appellants' NOA, the respondent contended that the directions given pursuant to sub-s 487(3) of the Companies Act 2016 ('the CA 2016') (formerly sub-s 237(3) of the Companies Act 1965 ('the CA 1965')) were in the nature of advice, and not a judgment or order within the scope of sub-s 67(1) of the CJA. Therefore, directions given pursuant to sub-s 487(3) of the CA 2016 were not appealable. On the other hand, the appellants submitted that the application before the High Court was not simply seeking direction from the court but involved the ascertainment of the commercial rights of parties not parties to the liquidation. The issues that arose for determination were: (a) whether the application before the High Court fell within sub-s 487(3) of the CA 2016 (sub-s 237(3) of the CA 1965), ie, the application was merely seeking directions for general administration from the court; and (b) whether any direction given was not a judgment or order and therefore did not fall within s 67 of the CJA 1964 pursuant to the case of *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 ('Ooi Woon Chee').

Held, dismissing the respondent's motion with costs in the cause:

(1) The court was of the considered opinion that the learned JC had made findings which had affected the rights of parties, including parties who were not parties to the application before the High Court. The findings by the JC went to the substantive rights of the parties, and were not mere directions or advice on administrative matters as envisaged by sub-s 237(3) of the CA 1965. Therefore, the directions sought the respondent were outside the purview of sub-s 237(3) of the CA 1965. The amended notice of motion in the court below was not only seeking relief under sub-s 487(3) of the CA 2016 (formerly sub-s 237(3) of the CA 1965) but was also premised on ss 472, 475, 486, 527 and 528 of the CA 2016 (formerly ss 236 and 292 of the CA 1965). Hence, the JC had made a finding on the *pari passu* principle and the undue preference rule. Therefore, unless the application was purely seeking directions or advice on administrative matters as envisaged by sub-s 487(3) of the CA 2016 (formerly sub-s 237(3) of the CA 1965), the application could not be said to fall within sub-s 487(3) of the CA 2016, and hence the principle in *Ooi Woon Chee* was not applicable (see paras 31 & 33–35).

(2) The purported directions sought by the respondent were not administrative directions. The 'directions' sought were to determine the issue of entitlement to the payments due from PBLT, which had adversely affected the commercial interests of third parties, including the appellants. The pith and substance of the application was to decide on

substantive questions or the substantive rights of the parties. Therefore, the 'directions' sought by the respondent were not in the true nature of directions seeking advice or guidance on administrative matters as envisaged by sub-s 487(3) of the CA 2016 and/or sub-s 237(3) of the CA 1965. Therefore, the respondent's application before the High Court fell outside the scope of the principle in *Ooi Woon Chee* and was therefore appealable (see paras 36 & 38–39).

[Bahasa Malaysia summary

Ini adalah notis usul responden ('lampiran 9') yang dibuat berdasarkan s 67(1) Akta Mahkamah Kehakiman 1964 ('AMK') untuk satu perintah agar notis rayuan yang difailkan oleh perayu ('NOA') dibatalkan. Responden dilantik oleh Pembinaan BLT Sdn Bhd ('PBLT') sebagai kontraktor utama berhubung dengan satu projek pembinaan ('projek tersebut'). Selepas itu, responden memberikan aspek-aspek tertentu kerja-kerja dalam projek tersebut kepada syarikat lain, yang merupakan subkontraktor yang dinamakan ('NSC'). Perayu adalah NSC bagi menjalankan kerja-kerja mekanikal dan elektrikal untuk projek tersebut. Di bawah kontrak utama, pembayaran kemajuan dari PBLT harus dibuat kepada responden dan responden seterusnya akan membuat pembayaran kepada perayu. Namun, sepanjang kontrak, PBLT telah membuat pembayaran kemajuan terus kepada perayu. Responden kemudiannya digulung dan pegawai penerima dilantik. Kira-kira sebulan setelah responden digulung, PBLT menamatkan kontrak utama dengan responden. PBLT kemudian memohon dan mendapatkan persetujuan pegawai penerima untuk membayar perayu secara langsung untuk memastikan bahawa perayu menyelesaikan skop kerja mereka. Seorang Baltasar bin Maskor ('Baltasar') kemudian dilantik sebagai pelikuidasi peribadi responden menggantikan pegawai penerima. Baltasar mengeluarkan surat bertarikh 13 April 2017 yang mengarahkan PBLT membuat tuntutan akhir NSC agar dibayar terus ke dalam akaun likuidasi responden. Walaupun terdapat bantahan oleh perayu, tiga pembayaran terakhir ditahan oleh PBLT, menyebabkan tiga tuntutan telah difailkan oleh perayu terhadap PBLT di mahkamah sesyen. Portneka kemudian mengemukakan bukti keberhutangan ('POD') kepada pelikuidasi. Setelah pemfailan ketiga-tiga tuntutan oleh perayu terhadap PBLT, responden memfailkan notis usul terpinda bertarikh 4 Mac 2020 di Mahkamah Tinggi. Usul tersebut mengemukakan persoalan berikut dan meminta relif berbangkit, antara lain: (i) sama ada jumlah RM2,385,412.81, yang perlu dan harus dibayar oleh PBLT kepada responden berkaitan dengan projek tersebut harus merangkumi jumlah yang perlu dan harus dibayar kepada NSC; dan (ii) sekiranya ya, sama ada kesemua pembayaran yang telah dibayar oleh PBLT kepada responden sehingga berjumlah RM2,385,412.81 berkaitan dengan projek tersebut hendaklah dilepaskan kepada kesemua pemiutang tidak bercagar yang mana POD mereka diterima secara *pari passu*, termasuk subkontraktor. Mahkamah Tinggi menjawab persoalan dalam perenggan (i) dan (ii) secara afirmatif. Tidak berpuas hati, perayu memfailkan rayuan

terhadap keputusan pesuruhjaya kehakiman ('PK'). Dalam menyokong usul mereka untuk menolak NOA perayu, responden berpendapat bahawa arahan yang diberikan menurut sub-s 487(3) Akta Syarikat 2016 ('AS 2016') (sebelumnya sub-s 237(3) Akta Syarikat 1965 ('AS 1965')) adalah bersifat nasihat, dan bukan penghakiman atau perintah dalam ruang lingkup sub-s 67(1) AMK. Oleh itu, arahan yang diberikan berdasarkan sub-s 487(3) AS 2016 tidak boleh dirayu. Sebaliknya, perayu berpendapat bahawa permohonan di hadapan Mahkamah Tinggi bukan sekadar memohon arahan dari mahkamah tetapi melibatkan penentuan hak komersial pihak-pihak yang bukan pihak kepada likuidasi. Isu-isu yang timbul untuk ditentukan adalah: (a) sama ada permohonan di hadapan Mahkamah Tinggi termasuk dalam sub-s 487(3) AS 2016 (sub-s 237(3) AS 1965), iaitu, permohonan tersebut hanya memohon arahan untuk pentadbiran am dari mahkamah; dan (b) sama ada sebarang arahan yang diberikan bukanlah penghakiman atau perintah dan oleh itu tidak termasuk dalam s 67 AMK 1964 berdasarkan kes *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 ('Ooi Woon Chee').

Diputuskan, menolak usul responden dengan kos dalam kausa:

(1) Mahkamah berpendapat bahawa PK yang bijaksana telah membuat dapatan yang telah memberikan kesan kepada hak-hak pihak, termasuk pihak-pihak yang tidak menjadi pihak dalam permohonan di hadapan Mahkamah Tinggi. Dapatan oleh PK adalah hak substantif pihak-pihak, dan bukan hanyalah arahan atau nasihat mengenai hal-hal pentadbiran seperti yang diperuntukan oleh sub-237(3) AS 1965. Oleh itu, arahan yang dipohon oleh responden berada di luar bidang kuasa sub-s 237(3) AS 1965. Notis usul yang dipinda di mahkamah di bawah ini bukan hanya memohon relif di bawah sub-s 487(3) AS 2016 (sebelumnya sub-s 237(3) AS 1965) tetapi juga berpandukan pada ss 472, 475, 486, 527 dan 528 AS 2016 (sebelumnya ss 236 dan 292 AS 1965). Oleh itu, PK telah membuat dapatan pada prinsip *pari passu* dan peraturan keutamaan yang tidak wajar. Oleh itu, melainkan sekiranya permohonan tersebut semata-mata memohon arahan atau nasihat mengenai hal-hal pentadbiran seperti yang diperuntukkan oleh sub-s 487(3) AS 2016 (sebelumnya sub-s 237(3) AS 1965), permohonan tersebut tidak boleh dikatakan termasuk dalam sub-s 487(3) AS 2016, dan oleh itu prinsip dalam *Ooi Woon Chee* tidak terpakai (lihat perenggan 31 & 33–35).

(2) Arahan kononnya dipohon oleh responden bukannya arahan pentadbiran. 'Arahan' yang dipohon adalah untuk menentukan isu kelayakan pembayaran dari PBLT, yang telah memberikan kesan kepada kepentingan komersial pihak ketiga, termasuk perayu. Inti pati permohonan tersebut adalah untuk memutuskan persoalan substantif atau hak-hak substantive pihak. Oleh itu, 'arahan' yang dipohon oleh responden tidak dalam bentuk sebenar arahan yang memohon nasihat atau panduan mengenai hal-hal pentadbiran seperti yang diperuntukan

oleh sub-s 487(3) AS 2016 dan/atau sub-s 237(3) AS 1965. Oleh itu, permohonan responden di hadapan Mahkamah Tinggi tidak termasuk dalam skop prinsip dalam *Ooi Woon Chee* dan oleh itu boleh dirayu (lihat perenggan 36 & 38–39).]

Cases referred to

Equiticorp Holdings Ltd (in statutory management) v Mak Kum Choon & Ors and another appeal [2020] 6 MLJ 1; [2020] 2 MLRA 114, CA (refd)
Kemacahaya Development Sdn Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Ors and another appeal [2019] 6 MLJ 364, CA (refd)
Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713; [2012] 2 CLJ 501, FC (distd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 236, 237(3), 292
Companies Act 2016 ss 472, 475, 486, 487(3), 527, 528
Courts of Judicature Act 1964 s 67, 67(1)

Appeal from: Post Winding Up No 28PW-218–03 of 2019 (High Court, Kuala Lumpur)

Sukhwinder Singh (Fatin Mazlan with him) (Akberdin & Co) for the appellants.
Mark Ho (Pang Li Xuan with him) (Chellam Wong) for the respondent.

Azizah Nawawi JCA:

THE APPLICATION

[1] This is the respondent's notice of motion (encl 9) made pursuant to s 67(1) of the Courts of Judicature Act 1964 ('the CJA') for an order that the notice of appeal filed by the appellants dated 23 July 2020 ('NOA') be struck out. The grounds of the application are:

(a) that the High Court proceedings was initiated by the liquidator of the respondent pursuant to s 487(3) of the Companies Act 2016 ('the CA 2016') (formerly s 237(3) of the Companies Act 1965 ('the CA 1965') to seek for a direction from the court in respect of the distribution of the monies due and payable by Pembinaan BLT Sdn Bhd (Company No 704498-D) to Mitisa Holdings Sdn Bhd (in liquidation) in relation to the project known as 'Cadangan Pembangunan Bangunan Tambahan bagi Ibu Pejabat Polis Kontingen Kuala Lumpur (IPK KL) serta komponennya di atas Lot PT 112, Seksyen 56, Mukim Bandar Kuala Lumpur untuk Tetuan Polis Diraja Malaysia' ('the project');

(b) that the learned judicial commissioner of the High Court of Kuala Lumpur had on 29 June 2020 given his advice or direction in respect of the distribution of the monies under the said project;

(c) that the appellants had appealed against the decision given on 29 June 2020;

(d) that a direction sought by a liquidator pursuant to s 487(3) of the CA 2016 (formerly s 237(3) of the CA 1965) is a direction or an advice for an administrative proceeding and not a judgment or an order within the scope of s 67(1) of the CJA and therefore is non-appealable; and

(e) as such, the appellants' NOA dated 23 July 2020 is misconceived or bad in law and ought to be struck out.

[2] Having considered the application and the submissions of the parties, this court had dismissed the respondent's motion with costs in the cause.

THE SALIENT FACTS

[3] The respondent was appointed by Pembinaan BLT Sdn Bhd (Company No 704498-D) ('PBLT') as the main contractor for the project.

[4] Subsequently, the respondent had awarded certain aspects of the works in the project to other companies, who were the nominated subcontractors ('NSCs'). Both the appellants were the NSCs to carry out the mechanical and electrical works respectively for the project.

[5] Under the main contract, progress payments from PBLT were to be made to the respondent and the respondent in turn would make payments to the appellants.

[6] However throughout the contract, PBLT has made the progress payments directly to the appellants.

[7] The respondent was wound up on 28 April 2014 and the official receiver was appointed. About a month after the respondent was wound up, PBLT terminated the main contract with the respondent.

[8] PBLT then sought the official receiver's consent to pay the appellants directly to ensure that the appellants complete their scope of works.

[9] The official receiver gave his consent on 3 September 2014. Under this arrangement, two payments were made by PBLT directly to the appellants on 16 October 2014, for interim progress claims ('IPC') No 36 and 37.

[10] On 2 April 2015, one Baltasar bin Maskor ('Baltasar') was appointed as the respondent's private liquidator in place of the official receiver. A

[11] Following this, one more direct payment was made by PBLT to the appellants on 20 May 2015, for IPC payment No 38. B

[12] On 29 May 2015, Baltasar issued a letter confirming the direct payments from PBLT to the appellants for the purposes of completing the appellants' scope of works. C

[13] On 8 June 2015, another direct payment was made by PBLT to the appellants, for IPC payment No 39.

[14] Two years later (2017), the appellants had completed their scope of works for the project. D

[15] Baltasar then issued a letter dated 13 April 2017 directing PBLT to make the NSCs' final claims to be paid directly into the respondent's liquidation account. E

[16] Despite the appellants' objections, three final payments were withheld by PBLT, resulting in three suits being filed by the appellants against PBLT in the Kuala Lumpur Sessions Court. F

[17] On 3 July 2017, Portneka had filed its proof of debt ('POD') with the liquidator.

[18] Upon the completion of the project, the final accounts were issued by PBLT. From the final account, it shows that: G

(a) a sum of RM747,857.11 was due to Portneka Sdn Bhd;

(b) a sum of RM856,714.82 was payable to Adamas Excel Sdn Bhd;

(c) a sum of RM173,539.51 was due to Sigma Elevator (M) Sdn Bhd; H

(d) a sum of RM75,960.25 was due to Camar Kreatif Sdn Bhd; and

(e) a sum of RM4,609,348.46 was payable to the respondent.

[19] After the filing of the three suits by the appellants against PBLT, the respondent had filed an amended notice of motion dated 4 March 2020 in the winding up court. The said motion posed the following question and sought consequential reliefs, inter alia: I

A (i) whether the sum of RM2,385,412.81, due and payable by Pembinaan BLT Sdn Bhd (Company No 704498-D) to Mitisa Holdings Sdn Bhd (in liquidation) in relation to the project known as 'Cadangan Pembangunan Bangunan Tambahan bagi Ibu Pejabat Polis Kontingen Kuala Lumpur (IPK KL) serta komponennya di atas Lot PT 112, Seksyen 56, Mukim Bandar Kuala Lumpur untuk Tetuan Polis Diraja Malaysia' ('the project') shall include the amounts due and payable to the nominated subcontractors including but not limited to:

B

(a) Portneka Sdn Bhd (Company No 375290-M);

C (b) Adamas Excel Sdn Bhd (Company No 470112-H);

(c) Sigma Elevator (M) Sdn Bhd (Company No 414986-V); and

(d) Camar Kreatif Sdn Bhd (Company No 338220-Y) ('the subcontractors').

D

(ii) if in the affirmative, then all payments paid by Pembinaan BLT Sdn Bhd to Mitisa Holdings Sdn Bhd (in liquidation) up to the sum of RM2,385,412.81 in relation to the project shall be distributed to all unsecured creditors whom their proof of debt are admitted in a *pari passu* manner, including the subcontractors (as amended);

E

(iii) provision or deductions be made in respect of the sum of RM531,441.12 already paid by Pembinaan BLT Sdn Bhd to Portneka Sdn Bhd on 10 January 2019.

F

[20] On 29 June 2020, the High Court answered the question in para (i), above in the affirmative and in relation to prayer (ii), the High Court ruled that the final sum up to RM2,385,412.81 shall be distributed to all unsecured creditors whom their proof of debt are admitted in a *pari passu* manner.

G

[21] The appellants had on 23 July 2020 appealed against the decision of the learned JC and in the memorandum of appeal, the appellants had pleaded that the learned JC had failed to consider or to give adequate consideration to the following, inter alia:

H

(a) the respondent company had no locus standi to make the application under s 237(3) of the CA 1965;

(b) the motion for directions under s 237(3) of the CA 1965 is an abuse of process;

I

(c) the application for directions under s 237(3) of the CA 1965 ought to be made before a liquidator makes a decision on the management of the affairs and property of the respondent and the distribution of its assets and not after;

(d) the issues raised and evidence tendered by the appellants pertaining to matters that occurred post winding up;

(e) the liquidator's instructions for payments to be made directly to the appellants means that the sums no longer formed part of the respondent's assets and therefore, fall outside the liquidation process; and

(f) that s 292 of the CA 1965 and the *pari passu* rule do not apply to decisions and payments made by a liquidator for the benefit of the wound up company.

OUR FINDINGS

[22] The respondent took the position that the directions given pursuant to sub-s 487(3) of the CA 2016 (formerly sub-s 237(3) of the CA 1965) are in the nature of advice, and not a judgment or order within the scope of sub-s 67(1) of the CJA. Therefore, directions given pursuant to sub-s 487(3) of the CA 2016 are not appealable.

[23] Subsection 487(3) of the CA 2016 reads as follows:

> Exercise and control of liquidator's powers
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> ...
>
> (3) The liquidator may apply to the court for directions in relation to any particular matter arising under the winding up ...

[24] Section 67 of the CJA reads as follows:

> Jurisdiction to hear and determine civil appeals
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.
>
> (2) The Court of Appeal shall have all the powers conferred by s 24A on the High Court under the provisions relating to references under order of the High Court.

[25] The respondent relied on the decision of the Federal Court in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713; [2012] 2 CLJ 501, where the Federal Court held, inter alia, as follows:

> [52] It is also our considered view that the Court of Appeal erred in failing to find that the directions given by the learned judicial commissioner under s 237(3) of the Act were in the nature of advice and is accordingly not a judgment or order within

A the scope of s 67(1) of the Courts of Judicature Act 1964 ('the CJA 1964') and are thereby non-appealable. An appeal to the Court of Appeal only lies from a judgment or order within s 67(1) of the CJA 1964 which provides:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter ...

B

[53] We are of the view a direction or advice given under s 237(3) of the Act is not a judgment or order. In *Re Sportsman's Leisure & Hobby Warehouse Pty Ltd (in liq)* [1989] 7 ACLC 1270, the court in considering the nature of application for directions under s 379(3) of the Companies (Queensland) Code which is similar to our s 237(3) of the Act held at p 1273 that a direction given under similar provisions C is not a 'judgment' or 'order'. The court followed *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 14 wherein it was held:

> That sub-s 237(3) does not, in my opinion enable the court to make binding orders on persons in the nature of judgments. The directions which a court may D give on an application under it are more like the directions or advice which may be given under s 45 of the Trustees and the Executors Acts. Such directions are not in my opinion, subject to appeal. (*Re Tooth's Trusts* [1877] 5 QSCR 10). I have set out these views on s 237(3) because it was contended that the decision of WB Campbell J created an estoppels between the parties. But there was no E judgment and no order. In my opinion there was no estoppels. Nor was there any right of appeal.

[54] The rationale or the purpose of s 237(3) of the Act is to enable a liquidator both to obtain advice and to protect his position as to personal liability in the administration of the winding up. This reasoning has been followed in several F Australian decisions. In *Re Security Provident Fund Ltd (in liq); Rodger v Gourlay* [1984] 2 ACLC 594 at p 595 the Australian Supreme Court ruled that:

> The major matter is that the question asked in the summons (or at least questions 1 and 2) are outside the scope of liquidators' summons for directions. It is clear, upon authority, that sub-s 379(3) does not enable the court to make G binding orders in the nature of judgment ...
>
> The function of a liquidators' summons for directions is to give him advice as to his proper course of action in the liquidation;
>
> ...

H In *Re JW Murphy & PC Allen* [1996] 19 ACSR 569, the Supreme Court of New South Wales held at p 570:

> an application for directions under s 379(3) of the Companies Code (or s 479(3) of the Corporation Law) is an administrative non-adversary proceeding, and a direction given pursuant to that section has no effect on the substantive rights of I persons external to the winding up.

[55] *As encl 485 direction is only an administrative proceeding by way of advice, any direction given is not a judgment or order and therefore does not fall within s 67 of the CJA 1964. It is our judgment therefore that the directions given by the learned judicial commissioner in encl 485 are non-appealable.* (Emphasis added.)

[26] On the other hand, the appellants had submitted that the application before the High Court is not simply seeking direction from the winding up court but involves the ascertainment of the commercial rights of parties not parties to the liquidation. The appellants relied on the case of *Equiticorp Holdings Ltd (in statutory management) v Mak Kum Choon & Ors and another appeal* [2020] 6 MLJ 1; [2020] 2 MLRA 114 where the Court of Appeal has considered the issue of the court's jurisdiction and competence to hear an appeal for applications under s 487(3) of the CA 2016 and/or s 237(3) of the CA 1965.

[27] Taking *Ooi Woon Chee* into consideration the Court of Appeal in *Equiticorp* clarified at p 133 of that case that:

> [76] We are, therefore, of the view that *the court necessarily has to ask itself whether s 237(3) has been properly, suitably or appropriately invoked before proceeding to consider the application on its terms. Section 237(3) is not available nor is it suitable for applications under the guise of directions for general administration when the pith and substance of the application is to decide substantive questions as against the persons making proprietary claims is adverse to the assets of the wound-up company.*
>
> [77] *Before any court is divested of jurisdiction and competence to hear any matter including an appeal (on the basis that the matter is not appealable), the court will and should always first examine the propriety of the matter or appeal. It is only where the matter or appeal is not properly within the ambit of the relevant law or bona fides is not established that the submission of lack of competency is condescended to.* This approach is evident in *Ooi* itself where the Federal Court set about examining first the factual matrix and circumstances in order to deal with the issue of bona fides and propriety or correctness of the application under s 237(3) before dealing with the matter of jurisdiction and competency of the appeal. It was only after it was satisfied that the application was bona fides (para 49) and proper (para 50) that the Federal Court considered and agreed with the issue of the non-appealability of the directions sought. (Emphasis added.)

[28] Therefore, this court in *Equiticorp* essentially asked the basic issue first, whether the application before the High Court falls within sub-s 237(3) of the CA 1965 (and/or sub-s 487(3) of the CA 2016), that is, the application was merely seeking directions for general administration from the court. If the application was merely seeking directions for general administration from the court as envisaged by sub-s 237(3) of the CA 1965 (and/or sub-s 487(3) of the CA 2016), then pursuant to the case of *Ooi Woon Chee*, any direction given is not a judgment or order and therefore does not fall within s 67 of the CJA 1964.

[29] Justice Mary Lim (now FCJ) added that an application made under sub-s 237(3) of the CA 1965 should not be made under the guise of directions for general administration, when in fact the pith and substance of the

application is to decide substantive questions or substantive rights of the parties.

[30] In *Kemacahaya Development Sdn Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Ors and another appeal* [2019] 6 MLJ 364, this court also had to ascertain whether the subject matter of the application falls within sub-s 237(3) of the CA 1965, before applying the case of *Ooi Woon Chee*. Justice Hasnah Mohamad (now FCJ) held as follows:

> [16] By virtue of the doctrine of stare decisis we are bound by the decision of the Federal Court in *Ooi Woon Chee* that a direction pursuant to s 237(3) of the CA 1965 is an administrative proceeding by way of a direction, and does not fall within s 67 of the CJA and is non-appealable. *However, as is obvious from the grounds of decision the learned judge had made findings as opposed to giving directions or advice on administrative matters, envisaged by s237(3) of the CA, the directions sought were outside the purview of s 237(3) of the CA.* We had further considered the submissions of the parties and we were nevertheless of the view that the application by the liquidator pursuant to s 237(3) of the CA 1965 and/or s 487(3) of the CA 2016 is in the first instance itself is a misconceived application, in that the asset which the liquidator sought direction for is not in his custody. (Emphasis added.)

[31] Having considered the application before the High Court and the decision of the learned JC, we are of the considered opinion that the learned JC had made findings which have affected the rights of parties, including parties who are not parties to the application before the High Court. In his judgment, the learned JC held as follows:

> 37 This court holds that payments owed by PBLT to respondent are assets of the respondent, and to allow the NSCs to receive the payments due to them direct from PLBT, would in the opinion of this court lead to the NSC being placed in a favourable position of 'leap frogging' or 'jumping the queue' in front of the other creditors whereby the undue preference rule will kick in/be triggered, see ss 292 and 293 of the CA 1965 where the relevant provisions in respect of all debts in a winding up shall be paid *pari passu* and the undue preference rule respectively are referred to.

[32] The learned JC has made a substantive and final finding that the payments owed by PBLT to the respondent are assets of the respondent, and this includes the payments due to the respective NSCs who have completed the works after PBLT had terminated the contract with the respondent. This position was strenuously disputed by the appellants, who took the position that when the official receiver made his decision to consent for payments to be made directly by PBLT to the appellants, those payments ceased to be part of the respondent's assets. Added to that, the appellants further argued that when the respondent's main contract was terminated by PBLT, the substratum of the respondent's subcontracts with the NSCs was extinguished. Hence, PBLT continued to make direct payments to the NSCs for work done after the termination of the respondent as the main contractor, with the consent of the

official receiver and the liquidator. These payments, according to the appellants, cannot now to be claimed to be assets of the respondent. A

[33] As such, we find that the above findings by the learned JC goes to the substantive rights of the parties, and are not mere directions or advice on administrative matters as envisaged by sub-s 237(3) of the CA 1965. Therefore, the directions sought the respondent are outside the purview of sub-s 237(3) of the CA 1965. B

[34] Added to that, we are of the considered opinion and we agree with the appellant that the amended notice of motion dated 27 February 2020 in the court below was not only seeking relief under sub-s 487(3) of the CA 2016 (formerly sub-s 237(3) of the CA 1965) but was also premised on ss 472, 475, 486, 527 and 528 of the CA 2016 (formerly ss 236 and 292 of the CA 1965). Hence, the learned JC has made a finding on the *pari passu* principle and the undue preference rule. C D

[35] Therefore, unless the application is purely seeking directions or advice on administrative matters as envisaged by sub-s 487(3) of the CA 2016 (formerly sub-s 237(3) of the CA 1965), which is not the case before us, the application cannot be said to fall within sub-s 487(3) of the CA 2016, and hence the principle in *Ooi Woon Chee* is not applicable. E

[36] Further, we take note that in the case of *Ooi Woon Chee*, the liquidators there needed directions on the proper course going forward in the administration of the liquidation before a decision was made. However, in the present case and having looked at the purported directions sought by the respondent, we find that the purported 'directions' are not administrative directions at all. The 'directions' sought are to determine the issue of entitlement to the payments due from PBLT, which had adversely affected the commercial interests of third parties, including the appellants. F G

[37] The directions sought are matters of substantive rights and liabilities of parties, including the appellants who were not properly before the court below. The appellants were not named in the application below, and neither were the other nominated subcontractors, namely, Sigma Elevator (M) Sdn Bhd and Camar Kreatif Sdn Bhd. H

[38] As such, we find that the pith and substance of the application was to decide on substantive questions or the substantive rights of the parties. We therefore find that the 'directions' sought by the respondent are not in the true nature of directions seeking advice or guidance on administrative matters as envisaged by sub-s 487(3) of the CA 2016 and/or sub-s 237(3) of the CA 1965. I

A CONCLUSION

[39] Since the learned JC has decided on the substantive rights of the parties, we are of the considered opinion that the decision of the learned JC do not fall within the nature of directions seeking advice or guidance on administrative matters as envisaged by sub-s 487(3) of the CA 2016 and/or sub-s 237(3) of the CA 1965. Therefore, we find that the respondent's application before the High Court falls outside the scope of the principle in *Ooi Woon Chee* and is therefore appealable. The respondent's motion is dismissed with costs in the cause.

Respondent's motion dismissed with costs in the cause.

Reported by K Selvaraju